IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-6160

LAWRENCE MITCHELL,

Petitioner

v.

W. T. GRANT COMPANY,

Respondent.

MOTION FOR PERMISSION TO FILE BRIEF AMICI CURIAE

AMICI CURIAE BRIEF

On Writ of Certiorari to the Supreme Court of Louisiana

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MAY IT PLEASE THE COURT:

The undersigned members of the Bar of this Honorable Court duly licensed to and practicing in the State of Louisiana, having read in the United States Law Week (42 L. W. 3345), excerpts from the argument of counsel in the above numbered and entitled cause and viewing with concern certain statements made in said arguments, the difficulties that this Court apparently experienced in obtaining the information that it sought and in order to remedy such possible errors and omissions to assist Your

Honors in deciding this case which is of paramount importance to the Bar and the other citizens of Louisiana, and in the absence of consent agreements from counsel of record, and in view of the fact that this cause has been argued in this Court, respectfully move the Court for permission under the unusual circumstances here existing, to file the accompanying brief in this case as amici curiae.

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CERTIFICATE

I hereby certify that copies of the above Motion and of the accompanying brief have been duly served on counsel of record in this cause by transmitting the same to them by United States Mail, postage prepaid, at their record respective addresses.

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Amicus Curiae

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AMICI CURIAE BRIEF

MAY IT PLEASE THE COURT:

The undersigned amici curiae herewith respectfully supplement the briefs heretofore filed in this cause for the sole purpose of affording your Honors information some of which you sought (seemingly unsuccessfully) during oral argument and which we submit is crucial in the consideration of the issues presented.

1. A query by Mr. Justice Rehnquist apparently[1] elicited a response that there is no safeguard insuring "that an allegation of danger to the collateral is in fact true or is made in good faith". We submit that this answer is not wholly correct for it is well recognized in Louisiana "that the stringent process of sequestration is a remedy stricti juris, and can only be resorted to in cases authorized by the very letter of our law."[2] It is issued only by order of the judge (not an administrative officer), and then only

[1] U. S. Law Week, 42 L.W. 3345, Col.3

[2] *James Beck & Co.* v. *Brady*, 6 La. Ann. 444, 445 (1851). See also: *Donohoe Oil & Gas Co.* v. *Mack-Jourdon Co.*, 144 So. 169, 175 (La. App. 2d Cir. 1932); *Mathe* v. *Mathe*, 177 La. 579, 148 So. 884, 885 (1933); *Debaillon* v. *Ponsony*, 5 Mart. (N.S.) 42 (La. 1826) and *C. A. Barriere & Brother* v. *Feste*, 9 La. Ann. 535 (1854).

upon the creditor's furnishing security in an amount determined by the court to be sufficient to protect the defendant against any damage or loss resulting from wrongful issuance.[3] It is not unusual for the amount of the bond to be fixed in an amount in excess of the creditor's claim, as it was in this particular case.

Wrongful sequester of property, even in good faith, entitles the debtor to recover all damages sustained by him, as well as attorneys fees,[4] and a plethora of cases illustrate that strict judicial enforcement of this often substantial liability has succeeded in insuring that Louisiana lawyers use extreme caution in applying for a writ of sequestration.

2. A query by Mr. Justice White regarding the possibility that there may be no balance due on the debt was answered that this contention could only be made "at a later trial", and his question whether such a challenge could be made in a proceeding seeking dissolution of the writ brought the response that our law was unclear on the point.[5]

These statements are not correct for the debtor whose property has been sequestered need suffer only a very temporary deprivation of possession, for on simple application to the issuing court he may obtain a summary hearing to dissolve the writ by a contradictory motion without

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[3] Arts. 3501 and 3574, Louisiana Code of Civil Procedure (hereinafter designated as "C.C.P.")

[4] Art. 3506, C.C.P., and Comment (d) thereunder. See also *General Motors Acceptance Corporation* v. *Sneed*, 167 La. 432, 119 So. 417 (1928) (humiliation, mortification, injury to social standing, injury to credit and financial standing, actual pecuniary loss, and attorney's fees, *held*, recoverable items of damage); *Talley* v. *Bradley*, 177 So. 2d 624 (La. App. 3rd Cir. 1965) (loss of profits and loss of use of movables sequestered, *held*, recoverable items of damage); *Roy D. Martin Lumber Co.* v. *Sinclair*, 220 La. 226, 56 So. 2d 240 (1951) (loss of use of property, amount paid to bondsman for release of property, attorneys fees, *held* recoverable items of damage); *American Steel Building Co.* v. *Brezner*, 158 So. 2d 623 (La. App. 3rd Cir. 1963).

[5] U. S. Law Week, 42 L.W. 3345, Col. 2.

the necessity of filing any bond.[6] At such a hearing, *the burden is upon the seizing creditor to prove* the grounds upon which the writ was issued[7]—in this case, the existence of a valid vendor's privilege—failing which, whether by reason of prematurity, payment, novation, insufficiency in pleadings, process, the bond furnished, want of jurisdiction, lack of indispensable parties, or any other legal reason, the writ is dissolved, the property returned to the debtor, and his right to sue for damages and attorney's fees reserved to him. This effectively corrects the statement made to the Court that at a hearing to quash the seizure there is only "an inquiry into the probable validity of the claim."[8] Rather, determined at that time is the creditor's absolute and unqualified right to the writ, which may result in a resolution of the issues on the merits. Contrary to the doubts apparently expressed by both counsel at the oral argument of this cause, the Supreme Court of Louisiana has said that it is *reversible error* to exclude evidence at the hearing on the ground that the same may also be introduced at the trial on the merits.[9]

3. The seizure effected by sequestration is provisional and conservatory only, pending final decision on the merits. Disposition of the property must await entry of personal judgment against the debtor, issuance of a writ of fieri facias (seizure and sale) and judicial sale after appraisement.

Moreover, the writ is granted only to a creditor secured by mortgage, lien or privilege,[10] such as the vendor's priv-

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[6] Art. 3506 C.C.P.
[7] Art. 3506, C.C.P. and Comment (a) thereunder; *Chas. A. Kaufman Co. Ltd. v. Gregory*, 244 La. 766, 154 So. 2d 392, 395 (1963).
[8] 42 L.W. 3346, Col. 2.
[9] *Chas. A. Kaufman Co. Ltd. v. Gregory, supra.*
[10] Art. 3571, C.C.P.

ilege stipulated to be the foundation of the sequestration here. A "bare assertion" of right to the property, such as that in *Fuentes*, would not have authorized either the seizure in this case nor any other seizure in Louisiana.

The privilege granted the vendor under Louisiana law as security for the payment of the purchase price, has no counterpart in the common law, but is unrecorded and wholly dependent for its existence on the debtor's continued possession of the affected property.[11] It simply is not correct, as was apparently indicated in oral argument, that such a privilege can exist without there being a balance due on the purchase price.[12] The precarious nature of its tenure makes a particularly urgent claim upon a court's conservatory powers, which alone can bar clandestine disposition by a defaulting debtor. Were the property involved here to have been transferred pending the trial of this case, the creditor's vendor's privilege would have been extinguished, and its right to priority in payment from an impecunious debtor lost.

Elimination of sequestration without prior hearing would so drastically curtail the rights of Louisiana creditors, who are without benefit of the self-help provisions of the Uniform Commercial Code[13] and who retain no

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[11] Art. 3227, Louisiana Civil Code; *W. T. Grant Company v. Mitchell*, 263 La. 627, 269 So. 2d 186 (1972); *In re: Wallace Lincoln-Mercury Company, Inc.*, 469 F. 2d 396 (5th Cir. 1972); *Thomas Y. Brent, Son & Co. v. Shouse*, 16 La. Ann. 158 (1861); Comment, "Vendor's Privilege." 4 *Tul. L. Rev.* 239 (1929-1930).

[12] 42 L.W. 3346, Col. 2.

[13] Louisiana is the only state which has not adopted the U.C.C., due in large measure to the unwillingness of Louisiana to depart from its civilian heritage by adopting the far different Arts. 2 and 9 of the U.C.C. relating to sales and security devices. See "The 1965 Bailey Lectures—A Forward", 26 *La. L. Rev.* 189 (1966) and "Proposal for Codification of the Commercial and Banking Laws of Louisiana—With the Uniform Commercial Code as a Guiding Pattern," 18 *La. Bar Journal* 251, 256 (March, 1971).

title by conditional sale,[14] that it would lessen the probability of credit sales to that segment of the populace with questionable credit.

[14] *In re: Wallace Lincoln-Mercury*, 469 F. 2d 396 (5th Cir., 1972); *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193; *Tangipahoa Bank & Trust Co. v. Kent*, 70 F. 2d 139 (5th Cir. 1934).

CONCLUSION

We therefore respectfully submit that *Fuentes* is inapplicable to the facts of this case and particularly inapplicable to the unique Louisiana law that affords debtors greater protection than is elsewhere available.

Respectfully submitted,

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